

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-115
Telecommunication Act of 1996	)	
	)	
Telecommunications Carriers' Use	)	
Of Customer Proprietary Network	)	
Information and Other Customer Information	)	
	)	
Implementation of the Non-Accounting	)	
Safeguards of Sections 271 and 272 of the	)	CC Docket No. 96-149
Communications Act of 1934, As Amended	)	
	)	
	)	

**COMMENTS OF SBC COMMUNICATIONS INC TO THIRD FURTHER NOTICE OF PROPOSED  
RULEMAKING**

SBC Communications Inc. (SBC), on behalf of itself and its subsidiaries, hereby files these comments in response to the Third Further Notice of Proposed Rulemaking (NPRM) issued in the foregoing docket.<sup>1</sup> SBC applauds the Commission's decision to seek comment on CPNI implications when a carrier goes out of business. SBC has been involved in over 53 bankruptcies over the past two years involving telecommunications entities, many of which resulted in carriers exiting a market and SBC acquiring some or all of their subscriber base. As the NPRM correctly reflects, in such instances, the FCC's CPNI rules are not crystal clear. This proceeding presents the FCC with the perfect opportunity to clarify and, where necessary, to amend its rules regarding the CPNI obligations of exiting and acquiring carriers.

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<sup>1</sup> *Implementation of the Telecommunications Act of 1996, Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Notice of Proposed Rulemaking, CC Docket No. 96-115 (rel. Sept. 7, 2001) (NPRM).

As detailed in these comments, the Commission should make the following findings. First, exiting carriers can use CPNI to transition customers to another carrier. Such use of CPNI is fully consistent with Section 222(c)(1) and further is in the public interest. Second, the FCC's existing notification requirements imposed on acquiring carriers are sufficient to notify customers that the exiting carrier will disclose and the acquiring carrier will access and use CPNI. If the Commission determines that notification is required, that obligation should be borne by the exiting carrier.

Third, pursuant to the total service approach, acquiring carriers can use CPNI of acquired customers to provide all the services provided by the exiting carrier and to market services within the service relationship without customer approval. Fourth, if the Commission determines in the *Wireline Broadband* proceeding that DSL service used in the provision of high-speed Internet access is not a Title II service, telecommunications providers would continue to be prohibited under Section 222 from using CPNI derived from their provision of telecommunications service to market any DSL service. Fifth, carriers are permitted to sell CPNI as an asset, which is consistent with Section 222.

**1. Exiting carriers should be able to disclose CPNI to acquiring carriers.**

The Commission should permit exiting carriers to use and disclose CPNI to transition their customers to another carrier. Such use and disclosure is certainly the general practice in the industry<sup>2</sup> and indeed is critical for the seamless transfer of customers between carriers. Further,

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<sup>2</sup> Carriers often indicate in their notification letters to consumers that they will transfer their account information to another carrier. *See, e.g.*, Letter, dated April 17, 2002, to Ms. Marlene Dortch, Office of the Secretary, Federal Communications Commission, from Kelley Drye & Warren LLP re: CC Docket No. 00-257, Notification of Transfer of Subscribers from Network Plus, Inc. to Broadview NP Acquisition Corp. d/b/a Broadview Net Plus; and Letter, dated September 4, 2002, to Ms. Marlene Dortch, Office of the Secretary, Federal Communications Commission, from Kelley Drye & Warren LLP re: CC Docket No. 00-257, Notification of Transfer of Subscribers from Advanced TelCom, Inc. and

such use and disclosure is consistent with Section 222(c)(1) because by giving their consent to the transfer, affected customers implicitly have given their consent to the use and disclosure of their CPNI.

As the Commission is aware, for carrier-to-carrier sales or transfers of subscriber bases, the Commission requires the acquiring carrier to obtain the affected customers' consent prior to transferring them to their service. Specifically, Section 64.1120(e) requires acquiring carriers to notify the customers of a selling or transferring carrier (exiting carrier) that the acquiring carrier will become their new provider on a specific date unless the customer selects an alternative provider.<sup>3</sup> This notification requirement is similar in many respects to the CPNI opt-out approval method adopted by the Commission in the Third Report and Order in this proceeding.<sup>4</sup> Thus, where a customer fails to act, the acquiring carrier and exiting carrier have the requisite consent to proceed with the transition using the customer's CPNI.

SBC recognizes that Section 64.1120(e) does not require the acquiring carrier to notify customers that the exiting carrier will disclose their CPNI. Nevertheless, such disclosure is certainly inferred. Indeed, many acquiring carriers have notified affected customers that they will access and use their records to effect the transition,<sup>5</sup> which of course means that the exiting

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Shared Communications Services, Inc. to GE Business Productivity Solutions, Inc. Pursuant to 47 C.F.R. § 64.1120.

<sup>3</sup> 47 C.F.R. § 64.1120(e).

<sup>4</sup> *Implementation of the Telecommunications Act of 1996, Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Third Report and Order, CC Docket No. 96-115 (rel. Sept. 7, 2001). The Commission revised Section 64.2007 of its rules to permit carriers to obtain opt-out consent prior to using their customer's CPNI to market communications-related services to that customer. Under the opt-out approval method, "a customer is deemed to have consented to the use, disclosure, or access to the customer's CPNI if the customer has failed to object thereto within the waiting period. . . ." 47 C.F.R. § 64.2003.

<sup>5</sup> See, e.g., Letter, dated September 24, 2002, to Ms. Marlene Dortch, Office of the Secretary, Federal Communications Commission, from OCMC, Inc. re: CC Docket No. 00-257, Transfer of Subscriber Base

carrier would have disclosed their records, i.e. CPNI to the acquiring carrier. Customers expect that exiting carriers will provide their new carrier with all information necessary to ensure a seamless transition. Thus, where a customer consents to the transfer of its service, the customer likewise has consented to the use and disclosure of its CPNI by the exiting carrier.

**2. If additional customer notification of CPNI disclosure is required, this obligation should be borne by the exiting carrier.**

If the Commission determines that the notification requirements of Section 64.1120(e) are inadequate to inform affected customers of the CPNI disclosure, the Commission should impose any additional notification requirements on the exiting carrier. The exiting carrier has the business relationship with the customer. Further, as the customer's existing provider, the exiting carrier would have previously provided the customer with all relevant CPNI information, as required under Section 64.2008 of the Commission's rules.<sup>6</sup> As a result, the affected customers would expect their existing provider, the exiting carrier, to inform them of any CPNI disclosures. Moreover, the FCC and most states already require exiting carriers to provide

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from One Call Communications, Inc. to OMCM, Inc.; Letter, dated June 27, 2002, to Ms. Marlene Dortch, Office of the Secretary, Federal Communications Commission, from ALLTEL Corporation re: CC Docket No. 00-257, Transfer of Subscriber Base from Verizon South, Inc. to Kentucky ALLTEL, Inc.; Letter, dated April 17, 2002, to Ms. Marlene Dortch, Office of the Secretary, Federal Communications Commission, from Kelley Drye & Warren LLP re: CC Docket No. 00-257, Notification of Transfer of Subscribers from Network Plus, Inc. to Broadview NP Acquisition Corp. d/b/a Broadview Net Plus; Letter, dated September 4, 2002, to Ms. Marlene Dortch, Office of the Secretary, Federal Communications Commission, from Kelley Drye & Warren LLP re: CC Docket No. 00-257, Notification of Transfer of Subscribers from Advanced TelCom, Inc. and Shared Communications Services, Inc. to GE Business Productivity Solutions, Inc. Pursuant to 47 C.F.R. § 64.1120; Letter, dated April 15, 2002, to William F. Caton, Acting Secretary, Office of the Secretary, Federal Communications Commission, from O'Melveny & Myers LLP re: CC Docket No. 00-257, Carrier Change Notification for United Systems Access Telecom; and Letter, dated May 31, 2002, to Ms. Marlene Dortch, Office of the Secretary, Federal Communications Commission, from Latham & Watkins re: CC Docket No. 00-257, Carrier Change Verification for CenturyTel of Alabama, L.L.C., Inc.

<sup>6</sup> 47 C.F.R. § 2008.

customers notification prior to exiting a market.<sup>7</sup> Thus, if additional notification is necessary, it is most appropriate for exiting carriers to notify their customers of the CPNI disclosure when they notify them that they are exiting the market.

**3. Acquiring carriers should be permitted to use the CPNI of acquired customers to market services within the service relationship without customer approval.**

Acquiring carriers should be permitted to market services within the service relationship to their acquired customers without customer approval, consistent with the total service approach adopted and recently reaffirmed by the Commission.<sup>8</sup> When a customer is transitioned to an acquiring carrier, the customer has consented to the acquiring carrier becoming its service provider. In these instances, the acquiring carrier now has a business relationship with the customer and is entitled to use, permit access to and disclose CPNI, without customer approval, to market and provision services within the existing customer-carrier relationship, consistent with Section 222 of the Act.

The NPRM asks whether the Commission should allow CPNI sharing for certain types of services, such as dial tone, but restrict CPNI sharing for other services. For customers that do not select an alternative provider prior to the transition date, the acquiring carrier should be able to use CPNI to provide all the services the customer previously had with the exiting carrier, not just dial tone service. Unless otherwise indicated in the transition notification letter, customers that fail to select alternative providers have consented to the transfer of *all* of their services. Thus, to the extent the acquiring carrier has the ability to mirror the services offered by the exiting carrier, the acquiring carrier has the necessary consent to provide these services. This is consistent with customer expectations. Further, customers always have the option of calling to

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<sup>7</sup> 47 C.F.R. § 63.71.

<sup>8</sup> *Third Report and Order*, ¶¶83-84.

limit the services they receive. In fact, acquiring carriers are required to include in the notification letter a toll-free customer service telephone number for such inquiries.

To find otherwise and conclude that acquiring carriers can use the CPNI of acquired customers only to provide dial tone or other select services would violate Section 222(c) and run afoul of the First Amendment. Section 222(c) expressly gives carriers the right to use CPNI to provide services requested by the customer. As the customers' new provider, the acquiring carrier is just like any other service provider and thus is entitled to use CPNI to market and provision services, consistent with Section 222(c)(1)(A) and (B).

Further, restricting an acquiring carrier's ability to use CPNI to provision all of an acquired customer's services would impermissibly restrict commercial speech in contravention of the First Amendment. If the Commission were to permit acquiring carriers to use CPNI only to provide dial tone, such a restriction would preclude acquiring carriers from marketing other services, such as voice-mail, which are clearly within the existing service relationship. This certainly would constitute a restriction on commercial speech, which must be justified under the *Central Hudson* test.<sup>9</sup>

To satisfy the *Central Hudson* test, the FCC would have to demonstrate that the foregoing restriction on commercial speech is necessary to further a substantial government interest, directly and materially advances that interest, and is narrowly drawn. Given that an acquired customer has consented to the transfer of its services to the acquiring carrier, there is no substantial government interest in restricting the use of CPNI to market services within the existing customer-carrier relationship. The only potential harm is the misuse or abuse of CPNI. However, acquiring carriers, like every other provider, are fully subject to the FCC's CPNI rules

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<sup>9</sup> *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557 (1980) (*Central Hudson*).

and thus liable for any misuse of CPNI. There is no justifiable reason to distinguish acquiring carriers in this instance.

Accordingly, the Commission should make clear that acquiring carriers can access and use CPNI of acquired customers to provision all services previously provided by the exiting carrier, and to market services, without customer approval, consistent with the total service approach.

**4. A Commission determination that DSL service used in the provision of high-speed Internet access is not a Title II service would not adversely effect the application of the CPNI rules.**

Classifying DSL service used in the provision of high-speed Internet access as an information service will have little effect on the application of the Commission's CPNI rules. While the Commission has allowed the use of CPNI in marketing certain information services "considered necessary to, or used in, the provision of the underlying telecommunication service," including voice-mail and voice-storage, the Commission has consistently prohibited the use of CPNI derived from telecommunications services to market Internet access services. The same would be true for any DSL service classified as an information service. Accordingly, carriers could not use CPNI, without customer approval, to sell DSL services classified as a Title I service.

**5. Carriers should be able to sell CPNI as an asset.**

The NPRM asks whether carriers can sell CPNI as an asset. Carriers should be able to do so and in fact do so today in instances where they sell a subscriber base to another carrier. CPNI is a critical component of a subscriber base and a carrier's inability to sell CPNI as an asset would substantially diminish the value of a subscriber base.

Importantly, nothing in Section 222 prohibits carriers from selling CPNI. Rather, Section 222 restricts the manner in which carriers can use or disclose CPNI without customer approval. Carriers are bound by these requirements and must obtain the necessary customer approval, where necessary, prior to using, accessing or disclosing CPNI. A Commission determination that carriers should not be permitted to sell CPNI presumes that Section 222 and the Commission's CPNI rules are inadequate to prevent the misuse and abuse of CPNI.<sup>10</sup> If such is the case, the appropriate course of action is to revise the CPNI rules to address the inadequacy, not to adopt requirements that extend well beyond the scope or intent of Section 222.<sup>11</sup>

Accordingly, the Commission should clarify that carriers can sell CPNI as an asset, however, such carriers are obligated to comply with the CPNI requirements set forth in Section 222 and the Commission's implementing rules.

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<sup>10</sup> Indeed there has been no evidence presented in this ongoing proceeding that carrier sales of CPNI have resulted in the misuse or abuse of CPNI. Such misuse of CPNI should be established prior to considering such a harsh restriction on the ordinary business practices of carriers.

<sup>11</sup> Arguably, the Commission could assert jurisdiction under Section 201(b), however, there is no need to do so as Section 222 and existing FCC's rules are sufficient to protect end-users' CPNI.



## **Conclusion**

For the foregoing reasons, the Commission should adopt the findings as set forth herein.

Respectfully Submitted,

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